UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 94-20-P-C***
	)	***(Civil No. 95-374-P-C)***
RICHARD N. PELLETIER,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Richard N. Pelletier moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Pelletier pleaded guilty to possession with intent to distribute cocaine, distribution of cocaine, and aiding and abetting the distribution and possession with intent to distribute cocaine, all in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). He bases his motion on claims of miscalculation of his sentence and ineffective assistance of counsel.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (per curiam) (citation omitted). Finding Pelletier's allegations to be either contradicted by the record or insufficient to justify relief if accepted as true, I recommend that his motion be dismissed without an evidentiary hearing.

I. Background

Pelletier pleaded guilty to possession with intent to distribute cocaine, distribution of cocaine, and aiding and abetting the distribution and possession with intent to distribute cocaine. Transcript of Rule 11 Proceedings, *United States v. Pelletier*, Crim. No. 94-20-01-P-C (Docket No. 52) at 2; Memorandum of Sentencing Judgment ("Sentencing Memo.") (Docket No. 26) at 1. At his sentencing hearing, Pelletier indicated that he was dissatisfied with his counsel's representation, and asked the court to appoint a different attorney to review his presentence investigation report ("PSI Report"). Transcript of Sentencing Proceedings, *United States v. Pelletier*, Crim. No. 94-20-P-C ("Sentencing Trans.") (Docket No. 33) at 1-3. The court denied Pelletier's request, *id.* at 10, and sentenced him as a career offender, Sentencing Memo. at 3. Pelletier filed a Notice of Appeal (Docket No. 30) but later voluntarily dismissed the appeal, Order of Court (Docket No. 34).

Pelletier's PSI Report listed six prior adult criminal convictions. PSI Report ¶¶ 32-37. Among these were the December 27, 1979 burglary of a dwelling in Springvale, Maine, and the January 20, 1980 burglary of a place of business in Freeport, Maine. *Id.* ¶¶ 33-34; Motion Under 28 USC § 2255 ("Section 2255 Motion") (Docket No. 47), app. at 24 (Affidavit of George Wood ("Wood Aff.") ¶¶ 4-5). On March 26, 1980 Pelletier pleaded guilty to the Springvale burglary in the Maine Superior Court (York County), and on April 3, 1980 the court imposed a two-and-one-half year prison sentence. Section 2255 Motion, app. at 29 (Docket Sheet in *State v. Pelletier*, CR-80-144 (Me. Super. Ct., Yor. Cty.)).

Pelletier was indicted for the Freeport burglary in the Maine Superior Court (Cumberland County) on March 4, 1980. Section 2255 Motion app. at 16 (Indictment, *State v. Pelletier et al.*,

CR-80-342 (Me. Super. Ct. Cum. Cty.)).[1] On March 31, 1980 Pelletier's counsel moved for a change of venue to the Superior Court sitting in York County in order to consolidate the two charges and obtain concurrent sentences. *Id.*, app. at 17 (Motion for Change of Venue, *State v. Pelletier* (case no. illegible) (Me. Super. Ct. Cum. Cty.)); *id.* app. at 24 (Wood Aff. ¶ 8). The motion was granted on April 3, 1980. *Id.*, app. at 17 (Motion for Change of Venue). On May 2, 1980, in the Superior Court sitting in York County, Pelletier pleaded guilty to the Freeport burglary and received a two-and-one-half year prison sentence, to be served concurrently with the prior sentence. Section 2255 Motion, app. at 28 (Docket Sheet in *State v. Pelletier*, CR-80-310 (Me. Super. Ct. Yor. Cty.)).

II. Sentence Calculation

Pelletier claims that the court improperly considered the two state burglary convictions in sentencing him as a career offender. "A nonconstitutional claim that could have been, but was not, raised on appeal, may not be asserted by collateral attack under § 2255 absent exceptional circumstances." *Knight v. United States*, 37 F.3d 769, 772 (1st Cir. 1994). Although advised of his right to appeal his sentence and the consequences of failing to do so, Sentencing Trans. at 24-25, Pelletier voluntarily dismissed his appeal.

Pelletier argues that his sentencing-correction and ineffective-assistance-of-counsel claims are "intimately related" because the documents on which he bases his sentence miscalculation argument were not entered into the appellate record by counsel. Reply to Government's Objection to Defendant's 28 U.S.C. 2255 Motion (Docket No. 59) at 3. One may not ordinarily raise

[1] Although the indictment charges that Pelletier committed the Freeport burglary on January 30, as opposed to January 20, 1980, *see* PSI Report ¶ 34; Section 2255 Motion, app. at 24 (Wood Aff. ¶ 5), this discrepancy is irrelevant to my recommended decision.

ineffective assistance of counsel on direct appeal unless it was raised in the district court. *United States v. Arango-Echeberry*, 927 F.2d 35, 39 (1st Cir. 1991). Thus, he argues, his sentence would have been summarily affirmed on direct appeal. Assuming arguendo that this asserted procedural dilemma constitutes an exceptional circumstance contemplated in *Knight*, I find nevertheless that Pelletier's sentence was properly calculated.

> A defendant is a career offender if:
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> (1) the defendant was at least eighteen years old at the time of the instant offence, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence[2] or a controlled substance offense.

U.S.S.G. § 4B1.1.[3] Pelletier argues that he does not meet the third requirement because his two burglary convictions were consolidated for sentencing, and thus count as only one prior felony conviction for purposes of the career offender guideline. *See* U.S.S.G. § 4A1.2 comment. (n.3).

Pelletier's two burglary convictions were not consolidated for sentencing. Pelletier was sentenced for the Springvale burglary on April 3, the day before his change-of-venue motion was granted in the Freeport case. His guilty plea and sentence in the Freeport case did not occur until

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[2] The term "crime of violence" includes certain enumerated offenses such as burglary of a dwelling, as well as other offenses that "involve[] conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(1)(ii). Contrary to Pelletier's assertion, burglary of a commercial structure constitutes a crime of violence under U.S.S.G. § 4B1.1. *See United States v. Dyer*, 9 F.3d 1, 2 (1st Cir. 1993) (burglary of a commercial structure constitutes crime of violence under U.S.S.G. 4B1.2 (edition not specified)); *Unites States v. Fiore*, 983 F.2d 1, 4-5 (1st Cir. 1992) (conspiracy to break and enter a commercial building constitutes crime of violence under U.S.S.G. § 4B1.2 (1991)), *cert. denied*, 507 U.S. 1024 (1993). The 1991 and 1993 editions of the Guidelines Manual provide identical definitions of "crime of violence" in section 4B1.2(1)(ii).

[3] Because the court sentenced Pelletier according to the 1993 edition of the United States Sentencing Commission Guidelines Manual, Sentencing Memo. at 1 n.1, all references herein are to the 1993 edition.

May 2, so formal consolidation was impossible.[4] In *United States v. Elwell*, 984 F.2d 1289 (1st Cir.), *cert. denied*, 508 U.S. 945 (1993), the defendant argued that four armed robbery sentences, although not formally consolidated, should be deemed constructively consolidated because they ran concurrently and were part of the same plea bargain. *Id.* at 1296 n.7. The First Circuit rejected this argument because the cases were not in fact consolidated.[5] *Id.* Thus, Pelletier's argument fails because the charges were not formally consolidated.[6]

III. Ineffective Assistance of Counsel

To prevail on his ineffective-assistance-of-counsel claim, Pelletier must satisfy the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). He must show that counsel's performance was constitutionally deficient, i.e., that it fell below an objective standard of reasonableness. *Matthews v. Rakiey*, 54 F.3d 908, 916 (1st Cir. 1995) (citing *Strickland*, 466 U.S. at 687-88). In doing so, he "must overcome the presumption that, under the circumstances, the

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[4] The materials proffered by Pelletier in his Motion to Expand the Record (Docket No. 62) are not "relevant to the determination of the merits" of his section 2255 Motion. Rules Governing Section 2255 Proceedings 7(a). Exhibit 1 explains that cases transferred from one Superior Court to another receive new docket numbers upon transfer. This is wholly irrelevant because the two cases commenced in different counties under different docket numbers. In any event, Pelletier was sentenced for the Springvale burglary before the Freeport case was transferred. Exhibits 2 and 3 demonstrate that his sentences ran concurrently, a fact that is already in the record. Accordingly, I deny Pelletier's Motion to Expand the Record.

[5] Additionally, the court expressed disfavor towards "treating unconsolidated cases as 'constructively' consolidated, thereby broadening beyond its language an already overbroad rule of thumb." *Elwell*, 984 F.2d at 1296 n.7.

[6] The two burglaries adequately support the career-offender determination. Accordingly, I need not consider Pelletier's argument that his conviction for mere possession of a controlled substance does not constitute a controlled substance offense within the meaning of U.S.S.G. § 4B1.1.

challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). Pelletier must also prove that counsel's deficient performance likely prejudiced his defense. *Strickland*, 466 U.S. at 687. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Pelletier asserts two bases for his ineffective-assistance-of-counsel claim. First, he claims that his counsel failed to investigate and/or make the court aware of the fact that his prior convictions for burglary and possession of a controlled substance did not support a career-offender determination. As discussed above, the two burglary convictions did support such a determination. Accordingly, counsel's performance in this regard was neither constitutionally deficient nor prejudicial.

Pelletier also claims that his counsel failed to ensure that Pelletier was fully informed as to the impact of his plea. Specifically, he claims that he did not have a "full understanding" of the recommendation that he be deemed a career offender, and that if counsel had fully explained these matters, "he *may* have proceeded to trial rather than pleading guilty to the charges." Section 2255 Motion, Memorandum at 10 (emphasis added).

Assuming arguendo that counsel's alleged failure to explain the career offender recommendation rises to the level of constitutionally-deficient representation, Pelletier must still demonstrate prejudice. In this context, Pelletier must show that, but for counsel's deficient representation, he would not have pleaded guilty. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). Pelletier explained to the sentencing court that he did not want to withdraw his guilty plea; he simply wanted a different lawyer to review his PSI Report and attempt to obtain a reduced sentence.

Sentencing Trans. at 6, 8, 10. Even in his memorandum he argues only that he "may have" proceeded to trial, not that he would have withdrawn his plea. Thus, Pelletier fails to demonstrate the prejudice required to prevail on his ineffective-assistance-of-counsel claim.

IV. Conclusion

For the foregoing reasons, I recommend that the petitioner's motion to correct his sentence be ***DENIED*** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of May, 1996.

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David M. Cohen
United States Magistrate Judge